In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1823

LARRY N. COOK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

GARY D. JACKSON
RICHARD C. JENKINS
KHENT H. ROWTON
1600 Adolphus Tower
Dallas, Texas 75202,
Attorneys For Petitioner.

Of Counsel:
JACKSON, JENKINS
AND ROWTON

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. ....

LARRY N. COOK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

---

The Petitioner, Larry N. Cook, respectfully prays that a WRIT OF CERTIORARI issue to review the decision of the United States Court of Appeals for the Fifth Circuit, which decision affirmed the decision of the trial court. The decision of the Fifth Circuit was entered in this proceeding on May 19, 1978.

OPINION BELOW

The decision of the United States Court of Appeals for the Fifth Circuit, affirming the decision of the trial court is not yet reported. The Opinion affirming the decision of the trial court is included herein as Appendix A.

JURISDICTION

On June 24, 1977, Petitioner, after pleading guilty, was sentenced to two five (5) year sentences on one Count for violation of 18 U.S.C. §§ 1341, 2, for mail fraud and for violation of 15 U.S.C. §§ 77q(a) and 77x (Sections 17 and 24 of the 1933 Securities Act). Jurisdiction of the 1933 Securities Act claim was questioned in the trial court due to lack of any impact on any person who was a citizen or resident of the United States. Further, the issue was appealed to the Fifth Circuit Court of Appeals. On May 19, 1978, the Fifth Circuit affirmed the judgment of the trial court. The only question before this Court is subject matter jurisdiction of the 1933 Securities Act question. This Court's jurisdiction lies under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Should the United States Courts exercise subject matter jurisdiction over an alleged violation of 15 U.S.C. §§ 77q(a), and 77x where the indictment alleges fraud only upon foreign investors and contains no allegations of damage or impact, through the fraud, on domestic investors or the domestic securities markets.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 15 U.S.C. §§ 77q(a) and 77x (Sections 17 and 24 of the 1933 Securities Act). These statutes are set forth in Appendix B of this Petition.

STATEMENT OF CASE

Petitioner entered a guilty plea to Counts 2 and 12 of a 25 count indictment. Counts 2 and 12 charged Petitioner, and others, with fraud in the offer of sale of securities in violation

of 15 U.S.C. §§ 77q(a), 77x and 18 U.S.C. § 2, and with mail fraud in violation of 18 U.S.C. §§ 1341, 2. Counts 1, 3-11, and 13-25 of the indictment were dismissed. The Court sentenced Appellant to imprisonment for five years on Count 2 and for five years on Count 12 to run consecutively to the sentence on Count 2. Count 2 (the Count involved in this Petition) deals solely with the sale of securities in the nature of fractional undivided interests in domestic oil wells to one German investor. Nowhere in the indictment is there any charge that any sales were made to any citizen of the United States or that there was any domestic impact or damage of any kind in the United States.

The indictment was originally filed on February 10, 1977, in the United States District Court for the Northern District of Texas. On April 26, 1977, a revised 25 count indictment was filed in the same court which superseded the indictment filed February 10, 1977. The indictment filed February 10, 1977, was ordered dismissed. On March 10, 1977, Defendant Hesse filed his Motion to Dismiss Counts 2-10 and 11-19, and on March 14, 1977, Appellant Cook filed his Motion to Adopt Pleadings of Other Defendants. These motions questioned subject matter jurisdiction of the 1933 Securities Act. On May 5, 1977, the Government filed its response to Defendants' Motion to Dismiss and on May 12, 1977, a hearing was held. At the hearing, Defendants' Motion to Dismiss was denied. Petitioner plead guilty to Count 2 and Count 12 of the indictment and was accordingly adjudged guilty of the offense of fraud in the offer of sale of securities in violation of 15 U.S.C. §§ 77q(a), 77x and 18 U.S.C. § 2, as charged in Count 2 of the indictment, and the offense of mail fraud in violation of 18 U.S.C. §§

1341, 2, as charged in Count 12 of the indictment. Sentence was imposed on June 24, 1977, at five years on each Count, to run consecutively. Counts 1, 3-11, 13-25 were dismissed. The Fifth Circuit Court of Appeals affirmed the judgment of the trial court on May 19, 1978. This Petition is directed solely at the Fifth Circuit's Opinion relating to Sections 17 and 24 of the 1933 Securties Act.

REASONS FOR GRANTING THE WRIT

The holding of the Fifth Circuit that subject matter jurisdiction lies with respect to a violation of 15 U.S.C. §§ 77q(a) and 77x where the transactions involved are transnational with no domestic impact or damage is incorrect, in conflict with other circuits and is a question not yet decided by this Court.

The allegations of Count 2 of the indictment allege a device, scheme, and artifice to defraud in violation of 15 U.S.C. §§ 77q(a) and 77x. This alleged fraud was perpetrated *solely* upon foreign investors. The indictment is devoid of any allegations that: (a) any sale of securities, alleged therein to have been fraudulent, was made to a resident or citizen of the United States; (b) any trading of such securities occurred in or over any United States securities market; (c) such sales of securities had any effect on the domestic securities market; or (d) there was any domestic injury from the sale of such securities.

Rather, the indictment contains allegations of miscellaneous acts in the United States, including: making of misrepresentations and ommissions; "use of the mails," transmittal of funds from the United States to Europe; and the maintenance of books and records in the United States.

These allegations of miscellaneous acts within the United

States do not alter the essentially foreign nature of the transactions alleged in the indictment. Nor do these miscellaneous acts fill the jurisdictional void created by the absence from the indictment of any factual allegation of impact on either the domestic securities markets or the domestic investing public. Repetition in the indictment of similar such miscellaneous contacts with the United States does not change the lack of interest of United States Courts in this basically foreign transaction. Indeed, in *Henry v. Richardson-Merell, Inc.*, 508 F.2d 28, 35 n. 15 (3rd Cir. 1975), the Court stated that contact with a jurisdiction sufficient to apply that jurisdiction's laws is not established "by piling up *quantities* of contacts." Only where a contact gives the state a factual basis to apply its governmental policy is it deemed relevant to show interest. (emphasis in original)

It is the proper scope of the criminal sanctions of the Securities Act, an Act commonly known to have been enacted to protect the domestic securities market from another crash similar to that of 1929, which is here contested. The absence of factual allegations in the indictment that the transactions in question had any impact, let alone a significant impact, on either the domestic investing public or the domestic securities market or that critical facets of the alleged fraud occurred in the United States mandates a dismissal for lack of subject matter jurisdiction.

It is now without doubt that federal legislation is to be construed "to apply only within the territorial jurisdiction of the United States, . . . based on the assumption that Congress is primarily concerned with domestic conditions." *Foley Bros., Inc., v. Filardo*, 336 U.S. 281, 285 (1949). Further, federal

legislation may not be interpreted to "impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945) (Opinion of Judge Learned Hand).

Thus, the argument of the Government that this Court has jurisdiction despite the lack of any allegation of domestic impact or that the acts within the United States were the gist of the alleged fraud, ignore the numerous cases which hold that subject matter jurisdiction depends on whether Congress intended to impose jurisdiction over "predominantly foreign" transactions, "quite apart from the power of the United States to impose" jurisdiction. See *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d. Cir. 1975), cert. denied 423 U.S. 1018 (1975); *LIT v. Vencapp, Ltd.*, 519 F. 2d 1001, 1016 (2d Cir. 1975); *Leasco Data Processing v. Maxwell*, 468 F.2d 1326, 1334-35 (2d. Cir. 1972).

In *SEC vs. Kasser*, 548 F.2d 109 (3rd. Cir. 1977), cert. denied sub nom. *Churchill Forest Industries (Manitoba) Ltd. v. Securities and Exchange Commission*, 431 U.S. 938 (1977), the Third Circuit reversed the decision of the district court in holding that there was no subject matter jurisdiction over the defendants whose conduct in the United States consisted of: (1) various negotiations; (2) execution of investment contracts in the United States; (3) utilization of the instrumentalities of interstate commerce to further the scheme; (4) incorporation of the defendant companies in the United States; (5) drafting of agreements executed abroad; and (6) transmittal of proceeds from the transactions to and from the United States. The decision in *Kasser* was based on three policy decisions: (1) a

denial of jurisdiction might embolden those who wish to defraud foreign securities purchasers or sellers to use the United States as a base of operations; (2) the possibility of reciprocal reponses on the part of other nations; and (3) a belief that the anti-fraud provisions of the Securities Act and Exchange Act (of 1934) were designed to insure high standards of conduct in securities transactions in the United States in addition to protecting the domestic securities market.

Kasser, however, was an SEC injunctive action. Thus, if the SEC did not have access to the Federal Courts, the conduct complained of therein would have gone unremedied. In the instant case, where additional criminal violations are alleged other than those under the securities laws, the foregoing argument is severely weakened. Moreover, the *Kasser* opinion relies on *IIT v. Vencap, Ltd., supra*, which expressly labels itself as "sui generis" (*supra* at 1019). The *Kasser* opinion, therefore, ignores substantial case law to the contrary effect. As such, it effectively operates with regard to the Appellant Cook herein as an unconstitutional application of an ex-post facto law violative of the Due Process Clause of the Fifth Amendment. See *Bouie v. Columbia*, 378 U.S. 347 (1964).

A review of the relevant case law other than the *Kasser* opinion is appropriate to illustrate the deviation in *Kasser* from the theretofor established course. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) implicitly involved the extent of the extraterritorial application of the securities acts. There, the Court recognized that the transactions there involved had substantial contacts with the United States, including the conducting of negotiations in the United States, (*supra* at 508) and the making of fraudulent representations and omissions within the

jurisdiction of the United States (*supra* at 522). Looking to the essentially foreign nature of the transaction, however, "a truly international agreement," the subject matter of which concerned investments "primarily situated in European countries" (*supra* at 515) with an impact on foreign business, not domestic securities markets, this Court refused to find subject matter jurisdiction under the Securities Exchange Act of 1934.

The lower courts have also addressed the problem of the applicability of the Act (i.e., subject matter jurisdiction) to essentially foreign transactions. In *Investment Properties Int'l. Ltd., v. I.O.S.*, (1970-71) CCH Fed. Sec. L. Rep. ¶93011 (S.D.N.Y. 1971), aff'd on expedited appeal without opinion (Docket No 71-593, 2d Cir. 1972) Judge Frankel stated that the "main consideration" in the determination of whether jurisdiction under the Securities Acts exists over an essentially foreign transaction was:

> (D) does the transaction have some significant impact on the domestic securities market or on domestic investors, and is extraterritorial application therefore necessary to protect securities trading in the United States and/or American investors? If there is no such domestic impact from a substantially foreign transaction, United States Courts have no reason to become involved and compelling reasons not to become involved, in the burdens of enforcement and the delicate problems of foreign relations and international economic policy that extraterritorial application may entail.

It is significant to note that the Court in *IPI, supra, recognized and considered* that contacts with and acts within the United States were involved in furtherance of the alleged defrauding transactions. These domestic activities, however, were not central to the alleged fraud and did not alter the

essentially foreign nature of the transactions. In that case, the domestic activities were as follows:

1) the alleged defrauding of American corporate subsidiaries of IPI;
2) the alleged fraudulent transfer of securities of United States corporations by IOS to IPI;
3) allegations that the transaction had been structured in the Southern District of New York, through, *inter alia*, New York;
4) alleged overreaching and unfair dealings in sales to foreigners of Florida condominiums developed by a United States subsidiary of IPI;
5) small purchases of IPI securities in the United States through two New York brokers, in addition to sales of securities to United States citizens who were officers, directors or full-time employees of IOS and its subsidiaries;
6) negotiations and preparation of documents in the United States to implement alleged fraudulent transactions closed and consummated outside the United States;
7) retention of United States Counsel and discussions and correspondence with said counsel in connection with alleged fraudulent transactions;
8) procuring an allegedly unfair loan for a wholly-owned United States subsidiary of IPI; and
9) joint purchase by IPI and a United States ban of securities of a Florida corporation as part of an allegedly fraudulent deal structured by IOS, in part, by meetings and mailings in the United States.

Despite the above list of domestic activities, the IPI Court denied the existence of subject matter jurisdiction since the determinative questions — involving the essentials of the transactions, the absence of effect on domestic securities markets, and the absence of injury to United States purchasers — pointed

to a foreign jurisdiction, foreign transactions, injury to foreign purchasers, and no effect on domestic investors or domestic securities markets.

A fortiori, here, where the only allegedly injured parties are European investors, no subject matter jurisdiction exists because the Securities Acts are not applicable to foreign transactions. Since the indictment does not sufficiently demonstrate, by factual allegations, the essence of the transactions, recourse is had to the corresponding SEC injunctive suit, *SEC v. HJH, et al*, Civil Action No. CA3-76-1611. In the SEC's Memorandum in support of a Preliminary Injunction, the SEC alleges the following facts:

1) all sales efforts were in Europe (p. 5, 10);
2) newspaper advertisements were placed in European newspapers (p. 8);
3) all investor monies were received in Europe, although some was subsequently transferred to the United States (p. 8, 6);
4) the investor contracts were signed in Zurich, (p. 6);
5) existing investors did make trips to the United States (p. 9);
6) production reports were allegedly mailed from the United States (p. 11);
7) material misstatements and omissions of material facts were made at locations unspecified.

Thus, even relying on the SEC's factual allegations in an injunctive suit, the domestic activities, when balanced with the essential foreign nature of the overall transactions, cannot sustain the applicability of the securities acts and therefore subject matter jurisdiction does not exist. The domestic activities are qualitatively not as strong as in *IPI, supra*, and the foreign nature is more predominate here.

Furthermore, other decisions which have denied the existence of the applicability of the securities acts over essentially foreign transactions, despite acts in and connections with the United States, are further authority for denying jurisdiction here.

In *Finch v. Marathon Securities Corp.*, 316 F. Supp. 1345, 1349 (S.D.N.Y. 1970), the Court dismissed the action and stated:

> . . . when, as here; (1) the substance of the allegedly fraudulent conduct occurred outside the United States; (2) the parties are predominantly foreign; (3) the subject shares are securities in a foreign corporation neither registered nor traded on a national securities exchange; and (4) there is no showing of any domestic injury, it would appear that the district court is without subject matter jurisdiction, despite the existence of other less meaningful American-based facts and events.

This is precisely the situation in the instant case.

In *Kook v. Crana*, 182 F. Supp. 388, 390 (S.D.N.Y. 1960), the Court addressed the intent of Congress and noted that:

> It is a canon of construction that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States (since) Congress is primarily concerned with domestic conditions.

There, notwithstanding contacts that were sufficient to vest jurisdiction had there been congressional intent as to the statute's applicability, the Court concluded that the essentially foreign nature of the transaction placed it outside the purview of the Act and hence subject matter jurisdiction did not exist.

In *Sinva, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 48 F.R.D. 385 (S.D.N.Y. 1969), the defendant had misapplied and appropriated the plaintiff's funds in the United

States. Yet, the Court found the transaction to be essentially foreign and in the absence of any impact on the domestic public or securities markets, the Act was not applicable and no subject matter jurisdiction could attach. In *Sinva*, a foreign plaintiff had purchased securities on the London exchange through a Paris office of the defendant New York Stock Exchange brokerage firm. In the present case no connection with any national stock exchange or domestic investors is involved. The present case, surely, is no less foreign in nature than was the *Sinva* case.

Finally, in *Henry v. Richardson*, 508 F.2d 28 (3rd Cir. 1975), the Third Circuit discussed the extraterritorial effect of substantive laws generally, stating:

> A long series of Supreme Court cases has held that before a jurisdiction can seek extraterritorial application of its laws, it must have a substantial interest in the party whom the statute seeks to protect. For example, in *Watson v. Employers Liability Insurance Corporation, Ltd.*, 348 U.S. 666 . . . (1954), the Court held a Louisiana statute which varied contract rights created outside of Louisiana to be valid under the due process clause because Louisiana had an overwhelming interest in protection of its own citizens . . . Where no such overwhelming interest in the parties is present, however, the Supreme Court has refused to allow the extraterritorial application of a local statute. (*Id.* at 39, n. 25).

(Also see *Recaman v. Barish*, 408 F. Supp. 1189 (E.D. Pa. 1975) where a securities fraud complaint was dismissed for lack of subject matter jurisdiction even though there was activity within the United States, and *F.O.F. Proprietary Funds Ltd. v. Arthur Young & Co.*, 400 F. Supp. 1219 (S.D.N.Y. 1975), where the Court dismissed for lack of subject matter jurisdiction a complaint alleging securities fraud because the debentures which where the subject of the alleged fraud "were offered only to purchasers outside the United States . . . and were issued to raise capital for foreign investment" (*Id.* at 1223).

Moreover, even the decisions in which jurisdiction has been upheld lend credence to a finding that this Court does not have subject matter jurisdiction over the instant case. In *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975), the alleged securities fraud stemmed from negotiations outside the United States. The negotiations led to the sale of preferred stock in Vencap, a Bahamian corporation whose shares were not traded on any American exchange, to IIT, a Luxembourg investment trust. The sale occurred outside the United States. The Court intimated that the conduct of the defendants may have been sufficient to justify the imposition of subject matter jurisdiction, but nevertheless remanded for further fact-finding as to the extent and nature of the fraudulent activities. The Court, however, stated:

> Our ruling on this basis of jurisdiction is limited to the perpetration of fraudulent acts themselves and does not extend to mere preparatory activities or the failure to prevent fraudulent acts where the bulk of the activities were performed in foreign countries. . . (*Id.* at 1018).

Here, the bulk of the activities were effectuated outside the United States. The vast majority of the selling, according to the indictment and the SEC, occurred in Europe. The advertising was solely in Europe. Only European investors were contacted. The contracts were entered into in Europe. Only allegedly preparatory and support activities were effectuated in the United States.

In *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975), cert. denied 423 U.S. 1018 (1975), the Court found

jurisdiction only in part. There, some of the victims were Americans, and hence there was a definite impact on domestic investors. No jurisdiction, however, was afforded to the claims of the nonresident and foreign plaintiffs. The Court stated that:

> . . . the antifraud provisions of the federal securities laws . . . do not apply to loss from sales of securities to foreigners . . . unless acts . . . within the United States directly caused such losses. (*Id.* at 993)

The alleged actions of the Appellant Cook in the United States are not specifically set forth. Indeed, no domestic actions of the Appellant Cook could be a direct cause of the alleged losses of foreign investors, as the foreign investors in question suffered no losses.

In *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968), *rev'd in part on other grounds en banc*, 405 F.2d 215 (1969), cert. denied 395 U.S. 906 (1969), the Court dealt with application of the 1934 Securities Exchange Act, and stated:

> We believe that Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities. (*Id.* at 206)
>
> We hold that the district court has subject matter jurisdiction over violations of the Securities Exchange Act although the transactions which are alleged to violate the Act take place outside the United States, at least when the transactions involve stock registered and listed on a national securities exchange, and are detrimental to the interests of American investors. (*Id.* at 208)

Thus the Court clearly stated that the injury must be to citizens of the United States or the domestic securities market or jurisdiction would not have existed.

Furthermore, in *Des Brisay v. The Goldforb Corp.*, 549 F.2d 133 (9th Cir. 1977), jurisdiction was upheld over an alleged fraud because the fraud had an adverse effect on the buyers, sellers, and holders of the involved securities which were registered on the American Stock Exchange. The Court distinguished *Bersch, supra,* on the grounds that the stock in *Bersch* was not listed on an American securities exchange, and the only adverse impact shown there was upon investors' confidence in the securities market generally.

For other decisions upholding jurisdiction where there was domestic impact, see *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515 (8th Cir. 1973) (jurisdiction found because of the "substantial" effect on the value of the stock held by the American plaintiffs and the lesser dividends received by the shareholders in the United States, *Id.* at 528); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972) (jurisdiction upheld where activities in the United States were combined with an impact on domestic investors); *Garner v. Pearson*, 374 F. Supp. 591 (M.D. Fla. 1974) (jurisdiction found because fraud had a significant impact on American investors); *Selas of America (Nederland) N.V. v. Selas Corp. of America*, 365 F. Supp. 1382 (E.D. Pa. 1973) (jurisdiction upheld because there was sufficient conduct within the United States and the transaction had a significant impact on American securities markets); *United States v. Clark*, 359 F.Supp. 131, 134 (S.D.N.Y. 1973) (jurisdiction found because of "substantial detrimental effects on the interests of American investors").

Finally, decisions of the United States Supreme Court concerning the extraterritorial application of other federal statutes support Appellant's contention that no subject matter jurisdiction exists herein. For example, see *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) (National Labor Relations Act not applicable to a foreign ship owned by a foreign subsidiary of an American company which carried foreign seamen and which traveled regularly between the United States, Latin America and other ports. The Court held that while Congress has the constitutional power to apply the Act to foreign ships while in American waters, Congress did not intend the Act to apply here); *Foley Bros., Inc., v. Filardo*, 336 U.S. 281 (1949) (Federal Eight Hour Law not applicable to the employment of an American citizen by an American contractor on a foreign construction project even though the project was being built on behalf of the United States and the employment contract had been executed in the United States); *United States vs. Sisal Sales Corp.*, 274 U.S. 268 (1927) (jurisdiction upheld over a charge that Mexican and American corporations had secured an unlawful monopoly of interstate and foreign commerce in sisal, because by their acts, the corporations "brought about forbidden results in the United States". *Id.* at 276).

It is significant to note that the securities involved herein were not traded on any domestic securities exchange. No domestic impact is, or even can be, alleged. At the hearing on Defendant's Motion to Dismiss, the Government made no allegation of domestic impact, but only recited instances of conduct within the United States. Indeed, the Government maintained that no domestic impact is even required.

There is a total absence of factual allegations necessary to support a finding that the securities acts were intended to cover the essentially foreign transaction involved herein. The criminal sanctions of the securities acts, therefore, cannot be applicable, and the Court has no jurisdiction.

Appellant's plea of guilty did not and could not operate as a waiver of the lack of the Court's jurisdiction. "(*A*) guilty plea waives only nonjurisdictional defects," *Mercado v. Rockefeller*, 502 F.2d 666, 672 (2d Cir. 1974), cert. denied 420 U.S. 925 (1975) and "(t)he parties may not by conduct waive a lack of jurisdiction or consent to jurisdiction which does not in fact exist." *McCusker v. Cupp*, 506 F.2d 459 (9th Cir. 1974). "When a Court lacks jurisdiction, any judgment ordered by it is void and unenforceable." *Hooker v. Boles*, 346 F.2d 285, 286 (4th Cir. 1965).

CONCLUSION

In conclusion, it appears to counsel for Petitioner that the holding of the Fifth Circuit with respect to the application of the 1933 Securities Act to transactions occurring outside the boundaries of the United States to protect foreign nationals is an unwarranted expansion of the Securities Laws. This Court should hear this issue to determine whether this expansion of the jurisdiction of the Securities Acts should continue. Therefore, Petitioner prays that a Writ of Certiorari issue to review

the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

GARY D. JACKSON

RICHARD C. JENKINS

KHENT H. ROWTON

JACKSON, JENKINS AND ROWTON
1600 Adolphus Tower
Dallas, Texas 75202,
Attorneys For Petitioner.

CERTIFICATE OF SERVICE

On the 23rd day of June, 1976, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D. C. 20530.

APPENDIX A

UNITED STATES of America,*
Plaintiff-Appellee,
v.
Larry N. COOK, Defendant-Appellant.*
No. 77-5497.

United States Court of Appeals,
Fifth Circuit.
May 19, 1978.

Appeal from the United States District Court for the Northern District of Texas.

Before THORNBERRY, RONEY and HILL, Circuit Judges.

THORNBERRY, Circuit Judge:

After a plea of guilty, the appellant, Larry N. Cook, was convicted of fraud in the offer of sale of securities in violation of 15 U.S.C. §§ 77q(a), 77x, and 18 U.S.C. § 2, and of mail fraud violation of 18 U.S.C. §§ 1341, 2. The trial judge sentenced Cook to five years' imprisonment for each offense.[1] On this appeal, Cook challenges only the jurisdiction of the trial court to impose a sentence for the securities count. Cook argues that the trial court lacked jurisdiction over the securities count because the alleged fraud was committed solely upon foreign investors and the fraud had no impact upon either the domestic markets or domestic investors.[2]

[1]The sentences are consecutive.

[2]Specifically, Cook alleges that the indictment failed to charge that (a) any fraudulent sale was made to a resident or citizen of the United States; (b) any trading of fraudulent securities occurred in or over any United States securities market; (c) the sale of the fraudulent securities had any effect upon the domestic securities market, or (d) there was any domestic injury from the sale of the fraudulent securities.

*The parties appear in reverse order, as shown, on the slip opinion. J, J & R.

I.

The indictment charged that Cook and his codefendants, while operating out of Dallas, Texas, defrauded European investors by operating a Ponzi* scheme.[3] The heart of the scheme was the offer and sale of fractional undivided working interests in oil and gas wells located in the United States.

Cook and his codefendants would place false and misleading advertisements in various European newspapers and periodicals. The advertisement would extol the virtues of investments in American oil and would falsely promise high monetary gain. Specifically, in other sales material, Cook and his codefendants, promised a 39.8% annual return on Ohio oil wells, 47% return on Texas wells, 56% return on West Virginia wells, and a 39% return on Kentucky wells. These returns were supposedly based upon the production figures for operating American oil wells, however, the production figures were grossly misstated and the actual returns, if any, were far from the promised figure.

Once an European investor decided to purchase an interest in the American oil wells, a contract was signed in Europe by the investor and a confederate of Cook. The contract would be returned to Dallas and the agreement was recorded in the United States.

As in a classic Ponzi scheme, payments based on the false production figures were actually made to some initial investors. These payments, which were financed from capital generated

*The indictment never uses the words "Ponzi Scheme" although the U. S. Attorneys' brief is full of erroneous and unwarranted references to "Ponzi Scheme." It doesn't appear that the court read the indictment at all. J, J & R.

[3]In a Ponzi scheme, a swindler promises a large return for investments made with him. The swindler actually pays the promised return on the

by subsequent investors, also served to attract new investors. Cook and his confederates also developed investor interest by having potential investors travel to the United States and inspect various Texas oil wells.

In December 1976, the Ponzi scheme fell through and Cook's guilty plea and this appeal followed.

II.

On this appeal, Cook contends that the district court lacked jurisdiction over the subject matter under the securities acts because the victims of his fraud were foreign investors and Congress did not intend to protect foreign investors.

This court is aware of the legal developments involving international fraud and the puzzling questions posed by some transactions with only a marginal United States nexus. *See Des Brisay v. The Goldfield Corp.*, 549 F.2d 133(9 Cir. 1977); *Securities and Exchange Commission v. Kasser*, 548, F.2d 109

initial investments in order to attract additional investors. The payments are not financed through the success of the underlying venture but are taken from the corpus of the newly attracted investments. The swindler then takes an appropriate time to abscond with the outstanding investments. As one author has described it, "he borrowed from Peter to pay Paul. And it worked . . . until Peter got wise."

The scheme is named after its most famous practitioner, Charles Ponzi. Ponzi was an Italian immigrant who successfully bilked an unwitting American public out of millions of dollars in a scheme involving international postal reply coupons. Ponzi ran his swindle from the heart of Boston's financial district and continued to run the scheme for about a year before his empire collapsed — all despite the fact that Ponzi knew little, if any, about international finance. Ponzi was eventually sentenced to prison and upon his release he was deported to Italy where the dictator Mussolini gave him a job in the finance ministry. Proving that swindle knows no geographic bounds, Ponzi escaped Italy to South America just before new charges could be brought against him. Ponzi died penniless in South America. For a fascinating account of Charles Ponzi's scheme see J. NASH, BLOOD LETTERS AND BADMEN, 448-451 (1973).

(3 Cir. 1977), *cert. denied sub nom. Churchill Forest Industries (Manitoba) Ltd. v. SEC*, 431 U.S. 938, 97 S.Ct. 2649, 53 L.Ed.2d 255 (1977); *Straub v. Vaisman & Co.*, 540 F.2d 591 (3 Cir. 1976); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2 Cir. 1975), *cert. denied*, 423 U.S. 1018, 96 S.Ct. 453, 46 L.Ed.2d 389 (1975); *IIT v. Vencapp, Ltd.*, 519 F.2d 1001 (2 Cir. 1975); *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515 (8 Cir. 1973); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2 Cir. 1972); *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2 Cir.), *rev'd on rehearing on other grounds*, 405 F.2d 215 (2 Cir. 1968, en banc), *cert. denied*, 395 U.S. 906, 89 S.Ct. 1747, 23 L.Ed.2d 219 (1969); *Recaman v. Barish*, 408 F.Supp. 1189 (E.D.Pa.1975); *F.O.F. Proprietory Funds Ltd. v. Arthur Young & Co.*, 400 F.Supp. 1219 (S.D.N.Y. 1975); *Garner v. Pearson*, 374 F.Supp. 591 (M.D. Fla. 1974); *Selas of America (Nederland) N. V. v. Selas Corp. of America*, 365 F.Supp. 1382 (E.D.Pa. 1973); *United States v. Clark*, 359 F.Supp. 131 (S.D.N.Y 1973); *Finch v. Marathon Securities Corp.*, 316 F.Supp. 1345 (S.D.N.Y. 1970); *Kook v. Crang*, 182 F.Supp. 388 (S.D.N.Y. 1960); *Sinva, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 48 F.R.D. 385 (S.D.N.Y. 1969); Note, American Adjudication of Transnational Securities Fraud, 89 Harv.L.Rev. 553 (1976). Fortunately, we may leave for another day an attempt to formulate the outer perimeter of American jurisdiction. The present scheme is so far within the jurisdiction of the American courts as to give us little pause.

Cook operated out of Dallas, Texas, his actions there were hardly preparatory as some cases describe. *See Bersch, supra* at 992; *IIT, supra* at 1018. The investors invested in American securities — obviously Congress intended jurisdiction over

American securities regardless to whom the securities are sold. The money from the scheme was repatriated. And some investors were actually defrauded, in part, in the United States.[4] Indeed, it appears to us that if there are any unimportant factors in the scheme it is the fact that the investors are European and the contracts were physically executed in Europe.

It is an absurd notion that Congress intended activity in the United States involving American securities to be exempt from the fraud provisions of the securities acts simply because the victims are not American citizens. Obviously, Cook and his confederates were capitalizing on the well-known American expertise in oil and gas production. Moreover, the European investors undoubtedly thought they could expect honest treatment from American entrepreneurs. That Congress would allow America to be a haven for swindlers and confidence men when the victims are European and while expecting the highest level of business practice when the investors are American is "simply unimaginable". *IIT, supra* at 1016. As Judge Friendly said for the Second Circuit in *ITT, supra* at 1017:

> We do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners. This country would surely look askance if one of our neighbors stood by silently and permitted misrepresented securities to be poured into the United States.[5]

AFFIRMED.

[4]Our holding today is there is more than an adequate basis for jurisdiction based on conduct occurring in the United States. We leave for another day the possibility that jurisdiction could be found as a result of effects in the United States.

[5]In *Leasco, Bersch*, and *IIT*, jurisdiction was found as a result of con-

duct in American territory. In *IIT*, Judge Friendly observed that "the securities laws are not to apply in every instance where something has happened in the United States." *Supra* at 1018. In this instant case, we need not be concerned with de minimus activity, the lion's share of the activity occurred in the United States and indeed actionable fraud occurred within the territorial confines of the United States — the oldest and surest basis for jurisdiction. In *Bersch* the court upheld jurisdiction as to American plaintiffs who were residents abroad if the American plaintiffs could show "acts . . . of material importance" occurred in the United States. Foreign plaintiffs had to show the occurrence of actual fraudulent acts in the United States. 519 F.2d at 993.

In *Kasser*, *supra* at 114, the Third Circuit said: The federal securities laws, in our view, do grant jurisdiction in transnational securties cases where at least some activity designed to further a fraudulent scheme occurs within this country.

APPENDIX B

Statutory Provisions Involved

Sections 17(a) and 24 of the Securities Act of 1933, 15 U.S.C. §§ 77q(a) and 77x, provide as follows:

Section 17. (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly —

(1) to employe any device, scheme or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Section 24. Any person who willfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both.